UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DAVID L. SMITH,

Petitioner-Appellant,

v. No. 98-1108

SUPREME COURT OF THE
UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER
Filed June 19, 1998

Before TACHA, BALDOCK and MURPHY, Circuit Judges.

David L. Smith appeals an order of the district court dismissing his petition brought pursuant to 28 U.S.C. §§ 2241 and 2255 for lack of subject matter jurisdiction. We affirm.

In the action filed below, Mr. Smith challenged his disbarment by the Supreme Court of the United States, contending that the disbarment violated his Constitutional rights. The district court concluded that because Mr. Smith is

not in custody, that it lacked subject matter jurisdiction over his petition.

As a jurisdictional prerequisite an applicant must be in custody when the application for habeas or § 2255 relief is filed. Carafas v. LaVallee, 391 U.S. 234, 238 (1968); United States v. Bustillos, 31 F.3d 931, 933 (10th Cir. 1994). To support jurisdiction, Mr. Smith argues the collateral consequences of his disbarment are the equivalent of being in custody. However, Mr. Smith does not cite to any cases, and, indeed there are none, which determine that disbarment alone is sufficient to meet the "in custody" requirement.

Although disbarment is considered "quasi-criminal", In re Ruffalo, 390 U.S. 544, 551 (1968), and is costly for an attorney, In re Palmisano, 70 F.3d 483, 486 (7th Cir. 1995), it does not follow that one who has been disbarred is in custody for purposes of habeas proceedings. As noted by the district court, the fundamental purpose of both §§ 2241 and 2255 is to allow an "attack by a person in custody upon the legality of that custody, and . . . the traditional function of the writ is to secure release from illegal custody."

AFFIRMED. The mandate shall issue forthwith.

Entered for the Court
PATRICK FISHER, Clerk of Court

by:
Ellen Rich Reiter
Deputy Clerk/Appeals Expediter

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Wiley Y. Daniel

Civil Action No. 98-D-539

DAVID L. SMITH,

Petitioner,

v.

Filed March 11, 1998

SUPREME COURT OF THE UNITED STATES,

Respondent.

ORDER OF DISMISSAL

Petitioner David L. Smith has filed a "Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241, and Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255." For the reasons stated below, the petition and motion will be dismissed pursuant to Rule 12(h)(3) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction.

Mr. Smith has been disbarred from the practice of law in the United States Supreme Court. In re Disbarment of David L. Smith, 116 S.Ct. 801 (1995). Mr. Smith contends that he was denied due process

of law in the proceedings before the United States Supreme Court that resulted in his disbarment. As relief, he asks me to grant his petition and motion and enter "an order reversing and declaring void ab initio the order of disbarment issued by the Supreme Court of the United States." Petition and Motion at 6.

Pursuant to Fed. R. Civ. P. 12(h)(3), I must dismiss this action if the court lacks subject matter jurisdiction. Subject matter jurisdiction may be raised sua sponte by the court at any time during the course of the proceedings. See McAlester v. United Air Lines, Inc., 851 F.2d 1249, 1252 (10th Cir. 1988). "The party seeking to invoke the jurisdiction of the court must demonstrate that the case is within the court's jurisdiction." United States v. Bustillos, 31 F.3d 931, 933 (10th Cir. 1994). For the reasons stated below, I find that this action pursuant to 28 U.S.C. §§ 2241 and 2255 must be dismissed for lack of subject matter jurisdiction because Mr. Smith is not in custody. See Maleng v. Cook, 490 U.S. 488, 490 (1989).

"A petition under 28 U.S.C. § 2241 attacks the execution of a sentence rather than its validity and must be filed in the district where the prisoner

is confined." Bradshaw v. Story, 86 F.3d 164, 166 (10th Cir. 1996). "A 28 U.S.C. § 2255 petition attacks the legality of detention . . . and must be filed in the district that imposed the sentence." Id. (citation omitted). In either case, the fundamental purpose of a writ of habeas corpus pursuant to § 2241 and a motion to vacate pursuant to § 2255 is the same: "they are 'an attack by a person in custody upon the legality of that custody, and the traditional function of the writ is to secure release from illegal custody.'" McIntosh v. United States Parole Comm'n, 115 F.3d 809, 811 (10th Cir. 1997) (quoting Preiser v. Rodriguez, 411 U.S. 475, 484 (1973)). The "in custody" requirement is designed to limit review "to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate." Hensley v. Municipal Court, 411 U.S. 345, 351 (1973).

Mr. Smith is not in custody. Instead, he is challenging the validity of the United States Supreme Court order disbarring him from the practice of law in the United States Supreme Court. He alleges that:

> Mr. Smith is "in custody" under or by color of the authority of the United States, for an act done or

> omitted in pursuance of an order, process, judgment or decree of a court or judge of the United States, and in violation of the Constitution or laws of the United States. See 28 U.S.C. § 2241. Mr. Smith is also "in custody" under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack. See 28 U.S.C. § 2255.

Petition and Motion at 5. These conclusory allegations do not establish that Mr. Smith is in custody as required by §§ 2241 and 2255. Even the most liberal definition of custody does not include an attorney who has been disbarred from the practice of law because an attorney who has been disbarred from the practice of law has not been subjected to a restraint upon his liberty.

Finally, even if Mr. Smith is in custody for the purposes of 28 U.S.C. § 2241 and 28 U.S.C. § 2255, this court

lacks jurisdiction to review and reverse a decision of the United States Supreme Court. Accordingly, it is

ORDERED that the "Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241, and Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255" and the action are dismissed pursuant to Fed. R. Civ. P. 12(h)(3) for lack of subject matter jurisdiction.

DATED at Denver, Colorado, this 11th day of March, 1998.

BY THE COURT:

WILEY Y. DANIEL
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CERTIFICATE OF MAILING

Civil Action No. 98-D-539

DAVID L. SMITH
1630 WELTON ST. SUITE 300
DENVER, COLORADO 80202

U S ATTORNEY

I hereby certify that I have mailed a copy of the ORDER to the above-named individuals on 3/12/98.

JAMES R. MANSPEAKER, CLERK

By: _____
Deputy Clerk

SUPREME COURT, STATE OF COLORADO
Case No. GC 95B-124
ORIGINAL PROCEEDING IN DISCIPLINE BEFORE THE GRIEVANCE COMMITTEE

FINDINGS OF FACT AND RECOMMENDATIONS OF THE HEARING BOARD

THE PEOPLE OF THE STATE OF COLORADO,

Complainant,

vs.

DAVID LEE SMITH,

Respondent.

This matter was heard on November 25 and 26, 1996 in Denver, Colorado, before a hearing board ("board") composed of Mark D. Korman and Bethiah Beale Crane, enlisted members of the Bar, and John F. Gallagher, Presiding Officer. The People were represented by James C. Coyle, Assistant Disciplinary Counsel, and the respondent appeared pro se.

The Complaint charged the respondent with violations of Rule 241.6 of the Colorado Supreme Court Rules Concerning

Discipline of Attorneys, the Colorado Rules of Professional Conduct, R.P.C. Rule 8.4(a) (violation of a rule of professional conduct), Rule 8.4(d) (engaging in conduct that is prejudicial to the administration of justice); and Rule 8.4(h) (engaging in any other conduct that adversely reflects on the lawyer's fitness to practice law).

The board heard testimony from the respondents' witnesses (Robert Atkinson, Jr., Julia Hook, James E. Qualls and Bennett J. Wasserman) and considered statements and arguments by Mr. Coyle and Mr. Smith. The complainant's exhibit 1 was received into evidence. The complainant's exhibit 5, the alleged Certificate of Service, was offered into evidence, but not admitted. The respondent's exhibits A, B, Q and R were received into evidence. The respondent's exhibits C through P, and S and T, were offered into evidence, but not admitted.

On November 22, 1996, the respondent filed the following:

(1) A Motion to Dismiss Complaint With Prejudice For Lack of Independent Prosecutor with the Supreme Court of the United States. A ruling on that motion was deferred, and said motion is hereby denied.

(2) A document styled "Respondent's Suggestion that the Supreme Court of Colorado Lacks Jurisdiction of the Subject Matter of the Complaint," which requested relief of an order dismissing the complaint. Ruling on that request was deferred and is hereby denied.

At the outset of hearing, the following motions were made:

1. The complainant orally moved to sequester witnesses. The motion was granted as to fact witnesses, excluding Julia Hook and the expert witnesses.

2. The respondent orally moved for dismissal of the complaint on grounds of the complainant's failure to provide a speedy trial and that the disciplinary counsel's office was aware of respondent's disbarment by the United States Supreme Court on November 7, 1995, yet it did not serve the complaint on respondent until December 29, 1995. Ruling on that motion was deferred and is hereby denied.

At the close of testimony, the parties were requested to file by December 5, 1996 additional information or position statements addressing the meaning and impact of disbarment by the United States Supreme Court, and that Court's requirement for reinstatement to practice before it. The complainant submitted additional information, including an affidavit from Deborah L. Ortiz, Disciplinary Counsel Investigator, stating that an attorney disbarred by the United States Supreme Court may petition for readmission to that court after completing three years of good standing in the jurisdiction where the lawyer is licensed, and the petition is subject to review by the full court.

On December 4, 1996, respondent filed his "Motion for an Expedited Determination of His Guilt or Innocence on the Charges of the Complaint, and Statement of Position on the Issue of the Duration of a Disbarment by the Supreme Court of the United States." Respondent stated that he had been unable to find any authority on the issue of the duration of a disbarment by the United States Supreme Court, and requested an expedited decision by this board.

On December 4, 1996, respondent filed his "Verified Supplement to Record

Concerning Certificate of Service Obtained by Assistant Disciplinary Counsel James C. Coyle from Rolf G. Asphaug." Respondent therein recited his recollections of fact concerning a question addressed to him at hearing as to the filing with this board of certain documents.

On January 8, 1997, complainant filed a Supplement to its Response to Respondent's Verified Statement to Record Concerning Certificate of Service which presented a set of certified copies received from the United States Supreme Court on January 7, 1997 of a motion for just damages and double costs and certificate of service regarding such motions received by the United States Supreme Court on February 15, 1995.

On January 13, 1997, respondent filed a "Motion to Strike Response and Supplement to Response filed by Assistant Disciplinary Counsel James C. Coyle," which requests the striking of the document presented by complainant as a certified copy of the certificate of service. Given the conclusion below, ruling on this motion is moot.

FINDINGS OF FACT

Based on the evidence presented, the board finds that the following facts are established by clear and convincing evidence:

1. The respondent was licensed to practice law in the State of Colorado on October 6, 1975, registration number 6934. The respondent is subject to the disciplinary and disability jurisdiction of the Colorado Supreme Court and its Grievance Committee in these disciplinary proceedings. C.R.C.P. 241.1(b), et seq.

2. The respondent was disbarred from the Supreme Court of the United States on November 27, 1995 for failing to comply with a March 6, 1995 order of that Court (copy attached and marked as complainant's exhibit A).

3. The March 6, 1995 order with which the respondent failed to comply granted a motion by the Regional Transportation District for award of damages and double costs related to the respondent's filing of a Petition for Writ of Certiorari with the United States Supreme Court in the case of James Edward Qualls and David L. Smith v. Regional Transportation District, et al. No. 94-1283, which the Regional Transportation

District claimed was frivolous. The respondent was ordered to pay $500.00 to counsel for the Regional Transportation District on or before March 27, 1995.

4. The respondent did not pay the $500.00. The respondent argued at hearing that he deliberately chose not to because he wanted the opportunity to contest the order upon which it was based.

5. An Order to Show Cause was entered by the Court on October 2, 1995 ordering the respondent to pay the $500.00 as previously ordered with 21 days, and to show cause in writing why he should not be disbarred from the practice of law in the Court or otherwise disciplined for failure to comply with the previous order. The respondent was suspended from practice before the Court pending outcome of the matter.

6. The respondent filed a Verified Response to Rule to Show Cause on October 25, 1995, but did not pay the $500.00 which he had previously been ordered to pay.

7. U.S. Supreme Court Rule 8 provides as follows:

Rule 8. Disbarment and Disciplinary Action

1. Whenever it is shown to the Court that a member of the Bar of this Court has been disbarred or suspended from practice in any court of record, or has engaged in conduct unbecoming a member of the Bar of this Court, that member will be suspended from practice before this Court forthwith and will be afforded the opportunity to show cause, within 40 days, why a disbarment order should not be entered. Upon response, or upon the expiration of the 40 days if no response is made, the Court will enter an appropriate order.

2. The Court may, after reasonable notice and an opportunity to show cause why disciplinary action should not be taken, and after a hearing if material facts are in dispute, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the Bar or for failure to comply with these Rules or any Rule of the Court.

8. The United States Supreme Court did not charge the respondent with conduct unbecoming a member of the Bar of the Court, did not allow 40 days in which he would be afforded the opportunity to show cause, and did not conduct a hearing of any sort.

9. A lawyer disbarred from the practice of law before the United States Supreme Court may petition for readmission after completing three years of good standing in the jurisdiction in which the lawyer is licensed.

10. Failure to pay a court ordered fine is not, in and of itself, grounds for disbarment in any jurisdiction.

DISCUSSION

11. This matter was prosecuted as a reciprocal proceeding based upon Rule 241.17. Independent violations of other disciplinary rules were also alleged, although no evidence was presented by Complainant in support of these violations other than the fact of the respondent's disbarment by the United States Supreme Court.

12. Rule 241.17(d) requires this board to refer the matter to our Supreme Court "with the recommendation that the same discipline be imposed by the Supreme Court as was imposed by the foreign jurisdiction" unless the board determines one of the following four exceptions has been met:

> (1) The procedure followed in the foreign jurisdiction did not comport with requirements of due process of law;
>
> (2) The proof upon which the foreign jurisdiction based its determination of misconduct is so infirm that the Supreme Court cannot, consistent with its duty, accept as final the determination of the foreign jurisdiction;
>
> (3) The imposition by the Supreme Court of the same discipline as was imposed in the foreign jurisdiction would result in grave injustice; or
>
> (4) The misconduct proved warrants that a substantially different form of discipline be imposed by the Supreme Court.

13. The complainant's case relied entirely upon the fact of the respondent's disbarment from the United States Supreme Court. Exploration of the basis and procedure related to the disbarment was made by extensive factual and expert testimony presented in defense of the respondent's actions.

14. The respondent essentially asserted two defenses. First, he argued his refusal to pay the $500.00 fine imposed by the Court was based upon his good faith belief that his original Petition for Writ of Certiorari was not frivolous, and that it had not received adequate consideration as an argument for extension or change of existing law. He believed disobeying the Court's order was the only avenue available to obtain further review of his case, and that the risk he faced, by not paying the fine, was a possible further sanction or threat of contempt. Second, the respondent contended he was not afforded due process in his disbarment, and that the conduct which led to his disbarment did not amount to an ethical violation which would warrant professional discipline in Colorado.

15. The respondent's tenacious quest for review of his client's case by the United States Supreme Court might be considered by some as ill-conceived, overzealous, or even bizarre quirkiness. Many attorneys, including the board members, would probably have conceded defeat, or at least paid the Court's sanctions while pursuing further review. The board members believe that the respondent's decision to not pay the Court's sanctions at least by deposit to the Court, if not to Mr. Asphaug, was unwise. The board is nevertheless persuaded that the respondent's refusal to pay the sanction reflected his belief, albeit also his poor judgment, that this was a necessary choice in order for his case to have a chance for additional review by the Court. The board also believes the discipline reasonably risked by pressing further review in such manner was an additional monetary sanction or a possible threat of contempt, and not disbarment.

16. Moreover, the board is extremely concerned with the process which led to the respondent's disbarment. Expert testimony was presented in the area of professional responsibility generally, and practice before the United States Supreme Court. That evidence demonstrated that the failure to pay a

court ordered sanction was not the basis for disciplinary action in any jurisdiction, or the United States Supreme Court. The complainant presented no evidence that such a failure was the basis for disciplinary action in Colorado.

17. It also appears to the board that the United States Supreme Court failed to follow the requirements of its own Rule 8, set forth above, by failing to advise the respondent that he was charged with "conduct unbecoming a member" of the Court, failing to afford the respondent a full 40 days within which to show cause, and failing to conduct a hearing on the material disputed fact of the reason behind the respondent's refusal to pay the $500.00 sanction. Taken as a whole, the evidence strongly implies that the majority of the Court's Justices did not review and may not have been aware of the respondent's disbarment. It appears to the board that the disciplinary action was taken by the Court's clerk and treated as a ministerial act.

18. Also troubling is the information presented in the affidavit of Deborah L. Ortiz, outlining that a lawyer disbarred from the practice of law before the United States Supreme Court may

petition for readmission after completing three years of good standing in the jurisdiction in which the lawyer is licensed. If the respondent's license to practice law in Colorado is revoked because of his disbarment by the United States Supreme Court, then his ability to petition for readmission to the United States Supreme Court after three years good standing in Colorado is foreclosed. The United States Supreme Court's readmission policy seems to contemplate the absence of reciprocal discipline in a lawyer's licensing jurisdiction.

CONCLUSIONS

19. The board concludes that the respondent's inability to be heard in a meaningful time and manner as required by the United States Supreme Court's Rule 8 amounts to a denial of due process, and that the proof upon which the disbarment was founded was so infirm that the Colorado Supreme Court cannot, consistent with its duty, accept as final the United States Supreme Court's determination. Additionally, the board believes that the imposition by the Colorado Supreme Court of the same discipline imposed by the United States Supreme Court would result in grave injustice to the respondent. Hence, the board concludes that the

exceptions in Rule 241.17(d) have been satisfied so as to preclude a recommendation that the Colorado Supreme Court impose the same discipline as that imposed by the United States Supreme Court.

20. The board also concludes that the respondent's actions did not constitute a violation of any of the Colorado Rules of Professional Conduct set forth in the complaint (R.P.C. Rules 8.4(a), 8.4(d) or 8.4(h)).

RECOMMENDATION

The hearing board recommends to the hearing panel that the complaint filed in this disciplinary proceeding be dismissed.

DATED this 6th day of March, 1997.

_____
Mark D. Korman

_____
Bethiah Beale Crane

_____
John F. Gallagher
Presiding Officer

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DAVID L. SMITH,

Petitioner-Appellant,

v. No. 98-1108

SUPREME COURT OF THE
UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER
Filed August 14, 1998

Before TACHA, BALDOCK, and MURPHY, Circuit Judges.

Appellant's petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by:
Deputy Clerk

Amendment I of the Constitution of the United States provides as follows:

> Congress shall make no law . . . abridging . . . the right of the people to petition the Government for a redress of grievances.

Amendment V of the Constitution of the United States provides as follows:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

28 U.S.C. § 2241 provides as follows:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
>
> (b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas

corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless--

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission,

order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

28 U.S.C. § 2253 provides as follows:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) . . . .
>
> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--
>
> (A) . . . .
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues

satisfy the showing required by paragraph (2).

28 U.S.C. § 2255 provides as follows:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine

the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order

entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.